Supreme Court, U.S.
FILED

No. 03-951 DEC 26 2003

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BRUCE WAYNE BINNS,

Petitioner,

v.

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Before 1996, lawful permanent resident aliens convicted of certain crimes except those defined "aggravated felony" were subject to deportation but remained eligible to seek a discretionary waiver of deportation under § 212 (c) of the Immigration and Nationality Act. Congress vastly expanded the "aggravated felony" definition and repealed § 212 (c) relief when it enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA).

In *Immigration & Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001) this Court held after AEDPA and IIRAIRA, that § 212 (c) relief remains available for aliens whose convictions were obtained *through plea agreements* and who, notwithstanding those convictions, would have been eligible for 212 (c) relief at the time of their plea under the law then in effect.

The question presented is whether the expanded "aggravated felony" definitions and the elimination of § 212(c) relief in AEDPA and IIRAIRA impose an impermissible retroactive effect for those convicted ten years earlier *after trial* - unlike a plea agreement - in violation of the Ex Post Facto Clause (Art. I, § 9, Cl.3) and the due process guarantee of the Fifth Amendment of the Constitution.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The immigration judge's opinion (Appendix ("Pet. App.") 11a-33a) is unreported. The decisions of the Board of Immigration Appeals affirming that opinion (Pet. App. 8a-10a), and of the court of appeals upholding the Board's decision (Pet. App. 1a-7a), are not otherwise published.

JURISDICTION

The court of appeals entered its opinion and order on September 29, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App. 33a-35a) are pertinent portions of the Ex Post Facto Clause of the Constitution, Art. 1, § 9, cl. 3; the Due Process Clause Guarantee of the Constitution, Amendment V; 8 U.S.C. 1182(c), as in effect before and after April 24, 1996; Sections 440 (d), 440(e) and 440 (f) of the Antiterrorism and Effective Death Penalty Act of 1996, Public Law 104-132, 110 Stat. 1214; Section 321 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546.

STATEMENT OF THE CASE

This case shows the inherent unfairness when harsh punitive measures codified in new statutes are applied to a ten-year-old criminal conviction which now results in petitioner's loss of lawful permanent resident status and an order for his deportation. Ten years before Congress enacted the Illegal Immigration Reform and Immigrant

Responsibility Act of 1996 (IIRIRA)[1] and the Antiterrorism and Effective Death Penalty Act (AEDPA)[2], although petitioner was convicted of possession of cocaine, he faced a possibility of deportation. However as a lawful permanent resident, he was eligible for discretionary relief from deportation under 212 (c) of the Immigration and Nationality Act.

Now, with the expanded definition of "aggravated felony", petitioner's conviction, obtained after a state jury trial, subjects him to certain deportation, because the eligibility for a discretionary waiver under § 212 (c) has been eliminated.

1. No matter how one chooses to characterize it, petitioner's reasonable reliance on the continued availability of discretionary relief which was available in 1986 when petitioner was convicted has been eliminated, albeit retroactively. Whether termed a punishment or a penalty, the application of IIRIRA and AEDPA has a retroactive effect to bar petitioner from *seeking* a waiver of deportation, and thus, takes away or impairs vested rights acquired under existing laws, and attaches a new disability, in respect to transactions or considerations already past.

The framers of the Ex Post Facto clause of the Constitution intended that there would be no such after-the-fact penalties imposed.

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1. Pub.L. No. 104-208, 110 Stat. 3009-546 (codified in relevant part at 8 U.S.C. §§ 1101, 1182, 1224, 1229, 1230, and 1252 (1996)).

2. Pub.L. No. 104-132, 110 Stat. 1214 (codified in relevant part at 8 U.S.C. § 1182 (1996))

a. Before the enactment of AEDPA, an alien like petitioner, lawfully admitted for permanent residence who was subject to deportation because of a criminal conviction could (like other permanent resident aliens) apply to the Attorney General for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). To be eligible for such relief, the alien had to show that he had had a lawful relinquished domicile in this country for seven years, and that, if his conviction was for an "aggravated felony," as defined in the Immigration and Nationality Act (INA) at 8 U.S.C. 1101(a)(43)(1994), he had not served a term of imprisonment for that conviction of five years or longer. See 8 U.S.C. 1182(c) (1994).[3] If the Attorney General, in the exercise of his or her discretion, denied relief, then the alien could challenge that denial by filing a petition for review of his deportation order in the court of appeals. See 8 U.S.C. 1105a(a) (1994) (repealed 1996) (incorporating Hobbs Administrative Orders Review Act, 28 U.S.C. 2341-2351).

b. In 1996, Congress twice restricted both the substantive eligibility of criminal aliens for discretionary relief from deportation and the availability of judicial

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3. This discretionary waiver was found in § 212(c) of the Immigration and Nationality Act. Although Section 1182(c) by its terms allowed the Attorney General to admit permanent resident aliens who had temporarily proceeded abroad and were returning to their domicile in the United States, it had long been interpreted (in response to the Second Circuit's decision in *Francis v. INS*, 532 F.2d 268 (1976) also to permit the Attorney General to waive the grounds for deportation of lawfully admitted permanent resident aliens who were present in the United States and in deportation proceedings. See *In re Silva*, 16 I.& N. Dec. 26 (BIA 1976); *Gonzalez v. INS*, 996 F.2d 804, 806 (6th Cir. 1993); *Ashby v. INS*, 961 F.2d 555, 557 & n.2 (5th Cir. 1992); *Tapia-Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981).

review of criminal aliens' orders.

2. Petitioner is a native and citizen of Jamaica who was admitted to the United States as a lawful permanent resident alien in November, 1978. App. 2a. In June 1986 following jury trial he was convicted in New Jersey state court of possession of cocaine and possession of cocaine with intent to distribute, and was sentenced to two concurrent terms of six years imprisonment and served eighteen months. *Id* Based *solely* on that conviction which the Attorney General alleged was an "aggravated felony" as now defined after AEDPA and IIRIRA, the Immigration and Naturalization Service (INS) issued a Notice to Appear in removal proceedings against petitioner.[4] The notice alleged that he was deportable pursuant to the Immigration and Nationality Act (INA) §§ 237(a)(2)(A)(iii) and (B)(I) as an alien who had been convicted of a controlled substance offense. Petitioner admitted that he was a lawful permanent resident alien who was a native and citizen of Jamaica but denied that he had been convicted of an aggravated felony.

In proceedings before an immigration judge (IJ) petitioner attempted to seek discretionary relief under 8

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4. On March 1, 2003, functions of several border and security agencies, including certain functions of the former INS, were transferred to the Department of Homeland Security and assigned to its Bureau of Immigration and Customs Enforcement. See Homeland Security Act of 2002, Pub.L. No. 107-296, § 441(2), 116 Stat. 2192 (to be codified at 6 U.S.C. 251(2)). The Attorney General remains responsible for the administrative adjudication of removal cases by immigration judges and the Board of Immigration Appeals. See 8 C.F.R. Pt. 1001 *et seq.* (Justice Department implementing regulations as recodified after Homeland Security Act). Thus, the correct respondent is the Attorney General of the United States. See 8 U.S.C. 1252(b)(3)(A).

U.S.C. 1182(c) (§ 212 (c) of the Immigration and Nationality Act), as well as asylum, withholding of removal, and withholding under the United Nations Convention Against Torture (CAT). On February 8, 2001, the IJ found petitioner removable as charged, denied all his applications for relief and ordered him deported to Jamaica. App. 11a-33a.

Petitioner appealed the denial of relief to the Board of Immigration Appeals (BIA). On August 22, 2002, the BIA dismissed petitioner's appeal. The Board of Immigration Appeals issued a three-paragraph *Per Curiam* order which affirmed the immigration judge's order. The Board explained that despite this Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), Mr. Binns is "not aided by the Supreme Court's *St. Cyr* ruling because he did not enter into a plea agreement but rather was tried and found guilty of the crimes which provide the basis for these proceedings."

On September 19, 2002, Mr. Binns petitioned for review of the BIA's decision to the United States Court of Appeals for the Eleventh Circuit. The court of appeals affirmed. App. 1a-7a. It concluded that it lacked jurisdiction to review the BIA decision, and that the constitutional challenges Mr. Binns raised were insubstantial, and thus it lacked jurisdiction over those claims, too.

REASONS FOR GRANTING THE PETITION

The petition should be granted because the court of appeals has decided a question which has not been settled by this Court, namely: may a lawful permanent resident convicted after a jury trial ten years before the passage of AEDPA and IIRAIRA retain the right to seek a discretionary 212 (c) waiver of deportation, as this Court allows for those convicted after entering a guilty plea.

The court of appeals decided an important decision that has not been decided by this Court

In *INS v. St. Cyr*, 533 U.S. 289 (2001), this Court concluded that "[A]pplying IIRIRA § 304 (b) to [bar a waiver for those] aliens who pleaded guilty or *nolo contendere* to crimes on the understanding that, in so doing, they would retain the ability to seek discretionary § 212 (c) relief would retroactively unsettle their reliance on the state of the law at the time of their plea agreement." 533 U.S. at 326. The Court did not decide whether the waiver would still be available for those convicted after jury trial.

Yet, for petitioner and other lawful permanent resident aliens like him who were convicted *after jury trial* - rather than after a plea - there were certainly the same settled expectations that they, too, would be eligible to seek the § 212 (c) waiver after their conviction.

This is an important question which this Court should decide. In *St. Cyr*, this Court explained that "ninety percent of criminal convictions today are obtained by guilty plea." Thus, *St. Cyr* has not resolved the question concerning the settled expectations of those individuals like petitioner who were also eligible to seek a 212 (c) waiver.

There is no principled distinction concerning the settled expectations between these two groups of lawful resident aliens.

By choosing to exercise the constitutional right to a jury trial, petitioner and other lawful permanent resident aliens like him who were convicted before 1996 had the same settled expectation that if convicted, they would be able to seek a waiver of deportation as well.

Naturally, if one exercised the right to a jury trial, there was a possibility that they would be acquitted, and thus, would not even face the prospect of deportation.

Thus, since the Court has clarified in *St. Cyr* that those who took a plea had settled expectations of their eligibility to seek a waiver of deportation, the Court also ought to clarify that those same settled expectations should similarly give petitioner and those like him the continued right to seek a waiver of deportation under § 212 (c).

Also, the Ex Post Facto clause of the Constitution was enacted to prevent the result confronting petitioner here.

This past term, the Court addressed Ex Post Facto arguments in the context of a challenge mounted by convicted sex offenders whose convictions occurred before the passage of the Alaska Sex Offenders Registration Act (ASORA). Under the ASORA, those who have been convicted of sex crimes are required to submit information as to their whereabouts to the Alaska Department of Public Safety. In turn, that information, as well as their photographs, motor vehicle information, place of employment, *inter alia*, is made available to the public, including on the internet. The Court ruled that because the ASORA is nonpunitive, its retroactive application does not violate the Ex Post Facto Clause. *Smith v. Doe*, 538 U.S. 84 (2003).

Instructive to the instant case is the analysis of Justice Stevens, who explains in dissent that:

> No matter how often the court may repeat and manipulate multifactor tests that have been applied in wholly dissimilar cases involving only one or two of these three aspects of these statutory sanctions, it will never persuade me that the registration and reporting obligations that are imposed on

> convicted sex offenders *and on no one else* as a result of their convictions are not part of their punishment. In my opinion, a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty is punishment. It is therefore clear to me that the Constitution prohibits the addition of these sanctions to the punishment of persons who were tried and convicted before the legislation was enacted.

Smith v. Doe, 538 U.S. at____, (2003)(Stevens, J., dissenting).

Likewise, Justice Ginsburg, joined by Justice Breyer also in dissent, explained that in their view, the ASORA when applied retroactively is incompatible with the Ex Post Facto Clause because the statute does not permit any possibility of rehabilitation. Although ostensibly concerned with the future protection of the public, there is no mechanism to determine whether the offenders who are required to register, have in fact, rehabilitated themselves.

This infirmity in the ASORA as observed by Justices Ginsburg and Breyer is also the problem which Mr. Binns confronts: there is no ability for him to demonstrate that he is not a danger to the community, and that he has in fact, amended his life.

One goal of our criminal justice system has been to rehabilitate offenders so that they become productive members of society and do not re-offend.

Here, by eliminating even the possibility of an inquiry into whether Mr. Binns has rehabilitated himself, the retrospective application of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and the Illegal

Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), prejudice Mr. Binns' rights to due process and liberty, and is a disservice to the public as well. There is now no incentive for someone like Mr. Binns to rehabilitate himself.

Forty-six years ago a case challenged the deportation order of a lawful permanent resident who five years after his admission to the United States was convicted of illicit trafficking in cocaine hydrochloride. He was not subject to deportation under the laws then in effect. Nearly twenty years after his conviction, Congress amended the immigration law and he then became subject to deportation for his crime. In dissenting from the Court's decision approving the deportation, Justices Black and Douglas explained what Mr. Binns believes about the instant case:

> What is being done to these respondents seems to me to be the precise evil the ex post facto clause was designed to prevent. Both respondents are ordered deported for offenses they committed long ago -- one in 1925 and the other in 1936. Long before the 1952 act reached back to add deportation as one of the legal consequences of their offenses both paid the price society then expected for their misconduct. They have lived in the United States for almost 40 years. **To banish them from home, family, and adopted country is punishment of the most drastic kind whether done at the time when they were convicted or later.** I think that this court should reconsider the application of the ex post facto clause with a view to

> applying it in a way that more effectively protects individuals from new or additional burdens, penalties, or punishment retrospectively imposed by Congress.

Mulcahey v. Catalonte, 353 U.S. 692, 694 (1957) (Black, J. and Douglas, J., dissenting)(emphasis added).

Finally, Chief Justice Fuller's eloquent dissent from a case involving a challenge, *inter alia*, on Ex Post Facto Clause grounds to the "Act to prohibit the coming of Chinese persons to the United States" rings true to the situation now before this Court:

> But the act before us is not an act to aggregate or repeal treaties or laws in respect of Chinese laborers entitled to remain in the United States, or to expel them from the country, and no such intent can be imputed to Congress. As to them, registration for the purpose of identification is required, and the deportation denounced for failure to do so is by way of punishment to coerce compliance with that requisition. No euphemism can disguise the character of the act in this regard. It directs the performance of a judicial function in a particular way, and inflicts punishment without a judicial trial. **It is, in effect, a legislative sentence of banishment, and, and as such, absolutely void.** Moreover, it contains within that the germs of the assertion of an unlimited and arbitrary power, in general, incompatible with the immutable principles of justice, **inconsistent with the nature of our government, and in conflict with the**

> **written constitution by** which that government was created, and those principles secured.

Fong Yue Ting v. United States, 149 U.S. 698, 702-03 (1893) (Fuller, C.J., dissenting)(emphasis added).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2003

APPENDIX

APPENDIX A

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 29 2003
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No.02-15101
Non-Argument Calendar
Agency Docket No. A21-142-283

BRUCE WAYNE BINNS, Petitioner,
versus
U.S. ATTORNEY GENERAL,
IMMIGRATION AND NATURALIZATION SERVICE,
Respondents.

Petition for Review of Final Decision
of the Board of Immigration Appeals

Before ANDERSON, BLACK and WILSON, Circuit Judges.
PER CURIAM:

This petition arises from immigration proceedings in which the Board of Immigration Appeals ("BIA") affirmed a final order of removal that was entered against Bruce Wayne Binns ("Binns") on the basis of his conviction for

possession of cocaine and possession of cocaine with intent to distribute.

The issue on appeal is whether this Court is barred from exercising jurisdiction over Binns's petition for review, pursuant to Immigration and Nationality Act (INA) § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).

We find that Binns is an alien removable for committing an aggravated felony and a controlled-substance offense under INA §§ 237(a)(2)(A)(iii) and (B)(I), 8 U.S.C. §§ 1227(a)(2)(A)(iii) and (B)(I). Additionally, we find that Binns does not raise a substantial constitutional question in his petition for review. Accordingly, we dismiss Binns's petition for review for lack of jurisdiction.

BACKGROUND

Binns, a native and citizen of Jamaica, has been a lawful permanent resident of the United States since 1978. In December 1986, Binns was convicted in the New Jersey Superior Court for Middlesex County of possession of cocaine and possession of cocaine with intent to distribute. Binns was sentenced to two concurrent terms of six years imprisonment and served eighteen months. Based on that conviction, on December 16, 1999, the Immigration and Naturalization Service initiated removal proceedings against Binns, alleging that he was an alien who had been convicted of an aggravated felony and a controlled substance offense and was thus deportable pursuant to the Immigration and Naturalization Act ("INA") §§ 237(a)(2)(AXiii) and (B)(I). An immigration judge found

Binns removable as charged on February 8, 2001.[3] Binns appealed that decision to the BIA, which affirmed the immigration judge's decision in all respects on August 22, 2002. Binns petitioned this Court for review of the BIA's final removal order.

STATUTORY BACKGROUND

The INA provides that any alien who has been convicted of an aggravated felony or controlled substance offense is subject to deportation. 8 U.S.C. §§ 1227(a)(2)(A)(iii) and (B)(I). Prior to 1996, aliens who had accrued seven years of lawful permanent residence in the United States could request discretionary relief from deportation pursuant to INA § 212(C), by arguing that the equities weighed in favor of their remaining in the United States. See 8 U.S.C. § 1182(C) (repealed in 1996). In a series of efforts that changed the immigration statutory scheme, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA). Pub.L. No. 104-132, 110 Stat. 1214 (codified in relevant part at 8 U.S.C. § 1182 (1996)). Section 440(d) of the AEDPA rendered aliens convicted of aggravated felonies ineligible for discretionary relief from deportation under 212 (C) of the INA.

The subsequent enactment of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") in September 1996 amended, among other things, the INA's

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3. On June 6, 2000, the immigration judge issued an oral decision finding Binns removable as charged. Thereafter, Binns filed an application for asylum and withholding of removal under the United Nations Convention Against Torture Act, alleging that he would be mistreated and tortured if he were removed to Jamaica as a criminal deportee. The February 8, 2001 order denied Binns's asylum and withholding of removal applications.

provisions for judicial review of removal orders.[2] Pub.L. No. 104-208, 110 Stat. 3009-546 (codified in relevant part at 8 U.S.C. §§ 1101, 1182, 1224, 1229, 1230, and 1252 (1996)). Section 306 of the IIRIRA repealed the INA's former judicial-review provisions and amended INA § 242, now codified at 8 U.S.C. § 1252. The statute states:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed [certain enumerated criminal offense including aggravated felony and controlled-substance offenses.

8 U.S.C. § 1252(a)(2)(C).

DISCUSSION

In this case, we must first decide whether we have jurisdiction to hear Binns's petition. We review questions of subject matter jurisdiction *de novo*. *Brooks v. Ashcroft*, 283 F.3d 1268, 1272 (11th Cir. 2002).

Because § 1252 substantially limits judicial review, we retain jurisdiction to determine only whether threshold statutory conditions exist. *Id.* This Court must first determine whether Binns "is (1) an alien; (2) who is [excludable]; (3) based on having committed a disqualifying offense" before reviewing the merits of Binns's petition. *Id.* at 1272. If those statutory conditions exist, § 1252 divests this Court of jurisdiction to review the removal order unless the petition "raise[s] substantial

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2. Additionally, section 304 of IIRIRA repealed 212(C) relief entirely, replacing it with "cancellation of removal procedure." See 8 U.S.C. § 1229b. Consistent with section 440(d) of AEDPA, the IIRIRA provided that cancellation of removal was not available to an alien convicted of any aggravated felony. Id.

constitutional issues." Id. at 1273.

The record supports, and Binns does not challenge, that Binns is an alien who is excusable for committing a disqualifying offense. Binns is a citizen of Jamaica who entered the United States and has been a lawful permanent resident since 1978. He was convicted of an aggravated felony and controlled substance offense and sentenced to a term of imprisonment in excess of one year. He was found to be removable by evidence which was clear and convincing before the immigration judge and the BIA. Because we find that Binns is an alien removable by reason of having committed an aggravated felony, § 1252 strips us of jurisdiction to review his final order of removal.

However, we are not foreclosed from consideration of Binns's petition if he has raised substantial constitutional issues. *See Calcano-Martinez v. INS*, 533 U.S. 348, 350 n.2 (2001) (noting that "courts of appeals retain jurisdiction to review 'substantial constitutional challenges' raised by aliens who come within the strictures of § 1252(a)(2)(C)").

Binns first argues that the retroactive application of the definition of "aggravated felony" violates the Ex Post Facto clause because it eliminates his ability to seek a 212(c) waiver in a removal order. At the time of Binns conviction for aggravated felony in December 1986, discretionary relief was available under 212(C). However, when deportation proceedings began on December 16, 1999, the status of the law had changed, and 212(C) relief was no

longer available.[3] Thus, according to Binns, the application amounts to an additional punishment for his conviction for which he has already served an eighteen month sentence.

We conclude that Binns's Ex Post Facto claim does not present a substantial constitutional question. The Supreme Court has held that the Ex Post Facto Clause does not apply to aliens in removal proceedings because removal is not a punishment. *See, e.g., INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime."), *Harisiades v. Shaughnessy*, 342 U.S. 580,593 (1951).

Binns next argues that his right to due process was violated because he is not permitted to present evidence that he has rehabilitated himself since his conviction in 1986 and that the equities weigh in favor of relief from the removal order. Binns argues that he should still be entitled to, at a minimum, pursue 212(c) relief.

We conclude that Binns's due process challenge does not present a substantial constitutional question. The Attorney General's grant of relief under the former section 212(c)

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3. Because the INS initiated removal proceedings after April 1, 1997, the effective date of the IIRIIRA, this case falls within the permanent rules, as opposed to the transitory rules which apply when removal proceedings were commenced before April 1, 1997, and against whom a final deportation order issued after October 30, 1996. See Galindo-Del Valle v. Attorney Gen., 213 F.3d 594, 596 (11th Cir. 2001). Both parties agree that the permanent rules of the IIRIRA apply.

The new definition of "aggravated felony" clearly applies to convictions which predate the passage of the llRllRA. 8 U.S.C. § 1101(a)(43). See also INS v. St. Cyr, 533 U.S. 289, 319 (2001).

of the INA was discretionary relief which has been replaced with very limited discretion to cancel removal of a deportable alien.[4] An alien has no constitutional right to discretionary relief or to be eligible for discretionary relief. *Balogun V. U.S. Attorney Gen.*, 304 F.3d 1303, 1311 (11th Cir. 2002); *Oguejiofor v. U.S. Attorney Gen.*, 277 F.3d 1305, 1309 (11th Cir. 2002). Because Binns has not been deprived of a constitutionally protected liberty interest, his due process rights have not been violated.

CONCLUSION

For the foregoing reasons, we find that we are without jurisdiction to review Binns's direct appeal from the Board of Immigration Appeals. Additionally, we find Binns's constitutional claims insubstantial, and hence they too fail to invoke our jurisdiction. We accordingly DISMISS Petitioner's appeal.

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4. The Attorney General may cancel removal of a deportable alien if the alien: (1) has been an alien lawfully admitted for permanent residence for not less than five years, (2) has resided in the United States continuously for seven years after having been admitted in any status, and (3) has not been convicted of any aggravated felony. 8 U.S.C. § 1229b(a).

APPENDIX B

[Emblem] Executive Office for Immigration Review
Board of immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

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Office of the District
Counsel/MI
155 So. Miami Ave., Rm. 500
Miami, FL 33130

Name: BINNS, BRUCE WAYNE A21-142-283
Date of this notice: 08/22/2002

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s_____
Lori Scialabba
Acting Chainnan

Enclosure
Panel Members:
FILPPU, LAURI S.
GRANT, EDWARD R.
PAULEY, ROGER

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

File: A21 142 283- Miami Date: Aug 22 2002
In re: BRUCE WAYNE BINNS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Oliver J. Langstadt, Esquire

ORDER:

PER CURIAM. The Immigration Judge's is affirmed. We agree that the respondent is removable as charged and ineligible for asylum, withholding of removal, and relief pursuant to the Convention Against Torture.

The respondent is also ineligible for a waiver of inadmissibility pursuant to the former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). On April 24, 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). Section 440(d) provides that aliens who are deportable by reason of a conviction for certain offenses are statutorily ineligible for section 212(c) relief.

Subsequently, the United States Supreme Court determined that the restrictions on section 212(c) relief do not apply retroactively to aliens who pled guilty prior to April 24, 1996, the effective date of AEDPA. *See INS v. St.*

Cyr, 121 S.Ct 2271(2001). However, this respondent is not aided by the Supreme Court's *St. Cyr* ruling because he did not enter into a plea agreement but rather was tried and found guilty of the crimes which provide the basis for these proceedings.

/S EDWARD R. GRANT
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Miami, Florida

File No. : A 21 142 283 June 6, 2000
In the Matter ofBRUCE WAYNE BINNS IN REMOVAL PROCEEDINGS
Respondent
CHARGE:
APPLICATIONS:
ON BEHALF OF RESPONDENT: ON BEHALF OF SERVICE:
Oliver Langston Laura Phillips

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is the subject of a Notice to Appear marked and entered as Exhibit Number 1 on April 12, 2000. After the respondent had acknowledged receipt of the Notice to Appear, the respondent denied allegation five relating to a criminal offense. The Service submitted various materials relating to that conviction marked for the record as Exhibit Number 2.

At issue is whether or not this respondent has been convicted of an aggravated felony and whether or not this respondent should be entitled to relief pursuant to Section 212 (c) of the Immigration and Nationality Act.

This Court would find in reviewing the materials submitted by the Service that the respondent has, indeed, been convicted of a controlled substance violation and would be removable pursuant to Section 237(a) (2) (A) (iii) of the Immigration and Nationality Act based on his conviction in case number 1153-8-85-02 out of the New

Jersey Superior Court, Middlesex County. The materials submitted contain the judgment and conviction and order for commitment in this matter.

This respondent here is found to be removable as charged as an aggravated felon pursuant to Section 237 (a) (2) (A) (iii), as well as pursuant to Section 237(a) (2) (B) (I) of the Immigration and Nationality Act because of the controlled substance violation.

This Court would find that the respondent is not eligible for relief under Section 212 (c). The Court would point out that the Eleventh Circuit has issued a decision relative to the ineligibility of this respondent for relief under Section 212 (c) - This Court would point out to *Myers v. INS*, 175 F.3d 1289 (11th Cir. May 1999)

The Court will also refer to *Innab v. the Attorney General of the United States*, citing at this point as 2000 WL231812 (11th Cir. Georgia); also the decision of *Ledman v. Reno*, 2000 WL338984 (11th Cir. March 31, 2000).

That being the decision, the Court will reset this matter for the filing of an application pursuant to the Convention Against Torture.

/s_____
TEOFILO CHAPA
Immigration Judge

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
MIAMI, FLORIDA

In The Matter of
BRUCE WAYNE BINNS
A21 142283
Respondent

CHARGE:
Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act
Section 237(a)(2)(B)(I) of the Immigration and Nationality Act

RELIEF APPLICATIONS:
Asylum - Section 208 INA
Withholding of Deportation - Section 241 (b)(3) INA
Withholding of Deportation - Convention Against Torture

For The Respondent:
Oliver J. Langstadt, Esq.

For the Immigration and Naturalization Service:
Nancy Waller, Esq.

DECISION OF THE IMMIGRATION JUDGE

This matter came before the Immigration Court as a result of a Form 1-862, Notice to Appear (hereinafter referred to as the "NTA") issued to the Respondent, BRUCE WAYNE BINNS, by the Immigration and Naturalization Service (hereinafter referred to as the "Service"). The Respondent, hereinafter also referred to as "BRUCE", was served his NTA by personal service on February 11, 2000.

The NTA alleges that the Respondent is removable pursuant to Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (hereinafter also referred to as the "Act" or"INA") and pursuant to Section 237(a)(2)(B)(I) of the Immigration and Nationality Act. The Respondent's NTA was marked as Exhibit 1 in her Record of Proceedings (hereinafter referred to as the "ROP") after the Court confirmed that the Respondent received his NTA.

The Respondent appeared with counsel at a Master Calendar hearing held April 14, 1999 and, through counsel, admitted that the allegations of fact numbered one (1) through four (4) in the Respondent's NTA were true and denied allegation five (5). The Service introduced a record of conviction and it has been marked as Exhibit 2 in the ROP.

In removal proceedings, where the alien is already present in the United States, the burden is on the Service to establish by clear and convincing evidence that the alien is deportable and a decision on deportability is not valid unless based upon reasonable, substantial, and probative evidence. See Section 240 (c)(3)(A) INA. The regulations implementing the statutory provision require that a determination of deportability be found by clear and convincing evidence. See 8 CFR. 240.08(a). The Respondent, through counsel, does not deny the convictions but does argue that the Respondent's convictions do not render him removable for "aggravated felony" convictions.

Section 101 (a)(43) of the Act defines an "aggravated felony" to include "any illicit trafficking in any controlled substance (as defined in Section 102 of the Controlled Substances Act), including any drug trafficking crime as defined in Section 924(c)(2) of Title 18, United States

Code. The Respondent was convicted on by jury trial in June, 1986 for violations of New Jersey Statute 24:21-20(a)(2) and New Jersey Statute 24:21-19(b)(3). While the Respondent's convictions occurred prior to November 18, 1988, the Respondent's convictions are still categorized as "aggravated felony" convictions. *See Matter of Lettman*, Int. Dec. 3370 (BIA 1998); *Lettman v. Reno*, 168 F. 3rd 463 (11th Cir. 1999); *Lettman v. Reno*, 185 F. 3d 1216 (11th Cir. 1999); *Lettman v. Reno*, 2000 WL 338984 (11th Cir. Mar. 31, 2000).

As defined in 18 U.S.C. § 924(c)(2) (1988), a "drug trafficking crime" means "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.)." The Respondent was convicted for possession of pure base cocaine in violation of New Jersey Statute 24:21-20(a)(2), which is a "high misdemeanor" punishable by imprisonment for not more than seven years and/or a fine of not more than $5000. The Respondent was also convicted for possession with intent to distribute pure free base cocaine in violation of New Jersey Statute 24:21-19(b)(3), which is a "high misdemeanor" punishable by imprisonment for not more than five years and/or a fine of not more than $15,000. The term "felony' is defined at 21 U.S.C. 802 (10) to include any Federal or State offense classified by applicable Federal or States law as a felony. A felony under Federal law is any offense where the maximum penalty exceeds one year. See 18 U.S.C. 3559. Even where a crime is not considered a felony under state law, it can still be considered such under Federal law. See *Matter of Davis*, 20 I & N Dec. 536 (BIA 1992). The Respondent's convictions would both be deemed felony convictions under Federal law. See 18 U.S.C. Section 841(a), 21 U.S.C. 841(b) and 18 U.S.C. 844 (a).

The Respondent's convictions are punishable under 21

U.S.C. 841(a) and under 21 U.S.C. 844(a) and, based upon the terms of imprisonment which may be imposed under 21 U.S.C. 841(b) and 21 U.S.C. 844(a), his crimes constitute felonies, as defined in 18 U.S.C. 3559. As the Respondent has been convicted of a crime punishable as a felony under the Controlled Substances Act, he has been convicted of a drug trafficking crime as defined by 18 U.S.C. 924(c)(2). Correspondingly, he has been convicted of an aggravated felony within the meaning of Section 101 (a)(43) of the Act.

The evidence of record and the admissions of the Respondent, through counsel, establishes the Respondent's removability, as charged in the NTA, by clear and convincing evidence.

The materials in the ROP are as follows:

1) Exhibit 1 - Notice to Appear;

2) Exhibit 2 - New Jersey Superior Court records in SBI number 276922B showing the Respondent was indicted on August 21, 1985 in indictment number 1153-8-85-02 and convicted after jury trial on charges of possession of free base cocaine and possession with intent to distribute free base cocaine;

3) Exhibit 3 - Advisals of the consequences of filing a frivolous application for asylum;

4) Exhibit 4- Advisals of the consequences of filing a frivolous application for asylum;

5) Exhibit 5 - Form 1-589, Request For Asylum in the United States, filed by the Respondent on August 18, 2000 before the Court;

6) Exhibit 6- Letter from the Court dated August 18, 2000 requesting an advisory opinion from the Department of State;

7) Exhibit 7 - Respondent's "Memorandum" with country background materials;

8) Exhibit 8 - Arrest records in case 82-22695 which indicates that the Respondent was charged on September 14, 1982 with conspiracy to commit armed robbery and further indicates that the Respondent's case was the subject of a "no action" on September 29, 1982;

9) Exhibit 9 - Arrest records indicating that the Respondent was charged on June 5, 1986 with loitering and prowling and further indicating that the Respondent was acquitted of these charges on July 10,1986;

10) Exhibit 10 - U.S. Department of State 1999 Country Report On Human Rights Practices for Jamaica.

The Respondent testified on his request for withholding removal under the Convention against Torture and he presented no other witnesses nor documents for consideration.

STATUTORY. REGULATORY. AND PRECEDENT STANDARDS FOR ASYLUM, WITHHOLDING OF REMOVAL AND TREATMENT UNDER THE CONVENTION AGAINST TORTURE

Pursuant to Section 208(b) of the Act, the Attorney General may grant asylum to an alien if the Attorney General determines that such alien is a refugee within the meaning of Section 101 (a)(42)(A) of the Act. However, an alien need not be granted asylum if the Attorney General determines that (I) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion; (ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States; (iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States; (v) the alien is inadmissible under subclause (I), (II), (Ill), or (IV) of section 212(a)(3)(B)(I) or removable under section 237(a)(4)(B) (relating to terrorist activity), unless, in the case only of an alien inadmissible under subclause (IV) of section 212(a)(3)(B)(I), the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or (vi) the alien was firmly resettled in another country prior to arriving in the United States. See Section 208(b)(2) of the Act. In addition, under Section 208(b)(2)(B)(I) of the Act, an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime. The Respondent, having been convicted of an aggravated felony, is not eligible for asylum pursuant to Section 208(b) of the Act.

A Respondents' Request for Asylum in the United States is contemporaneously viewed as an application for withholding of removal pursuant to 8 CFR. 208.3(b). Section 241 (b)(3) places restrictions on the removal of an alien to a country where an alien's life or freedom would be threatened; moreover, an alien may not be removed to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion. However, exceptions to the non-removal lie where an alien is deportable under Section 237(a)(4)(D) of the Act or if the Attorney General decides that (I) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a

particular social group, or political opinion; (ii) the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States; (iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or (iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States. See Section 241 (b)(3) of the Act.

An alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. See Section 241 (b)(3) of the Act. As the Respondent was sentenced six years for both of these crimes, he is not eligible to request withholding pursuant to Section 241 (b)(3) of the Act because he has been convicted for a particularly serious crime. The Respondent is also ineligible for withholding of removal because his drug trafficking conviction is a particularly serious crime. See *Matter of U-M*, 20 I & N Dec. 327 (BIA 1991).

For asylum applications filed on or after April 1, 1997, an application also shall be considered for eligibility for Withholding of Removal under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, hereinafter also referred to as the "Convention Against Torture", if the applicant requests such consideration, or if the evidence presented by the application indicates that he or she may be tortured in the country of removal. § 8 C.F.R. 208.13(c)(1).

In the case at bar, Respondent seeks relief from removal in the forms available involving non-refoulment, that is, Withholding of Removal under the Convention Against

Torture, or in the alternative, Deferral of Removal under the Convention Against Torture. See Exhibit 5. As noted above, asylum pursuant to Section 208 of the Act and withholding of removal pursuant to Section 241 (b)(3) of the Act are not available, because Respondent has been convicted of an aggravated felonies which are also considered particularly serious crimes. See INA 208(b)(2)(A) and INA 241(b)(3)(B)

The term "torture" has a very specific meaning under the Convention Against Torture and is defined, in part, as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person." See 8 C.F.R. 208.18(a)(1). The severe pain or suffering must be inflicted on the applicant or a third person for one of four purposes, specifically: (1) obtaining information or a confession; (2) punishing an act committed or suspected of having been committed; (3) intimidating or coercing; or (4) for any reason based on discrimination of any kind. Id. Torture is an "extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture." See 8 C.F.R. 208.1 8(a)(2). It also does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. See 8 C.F.R. 208.18(a)(3). Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions which defeat the object and purpose of the Convention Against Torture. Id.

For mental pain or suffering to constitute "torture," such torture must be "prolonged mental harm." See 8 C.F.R. 208.18(a)(4). Moreover, the mental pain or suffering must be caused by or resulting from intentional or threatened infliction of severe physical pain or

suffering, threatened or actual administration or application of mind altering substances or similar procedures calculated to disrupt profoundly the sense or personality, or threatened imminent death. Id. These causes or results can be directed toward the applicant or another. 8 C.F.R. 208.1 8(a)(4)(iv).

In addition, in order to constitute "torture," an act "must be directed against a person in the offender's custody or physical control." See 8 C.F.R. 208.18(a)(6). Further, the pain or suffering must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." See 8 C.F.R. 208.18(a)(1). "Acquiescence" requires that the public official have awareness of the activity prior to its occurrence and "thereafter breach his or her legal responsibility to intervene to prevent such activity." See 8 C.F.R. 208.18(a)(7); see also *Matter of S-V-*, Interim Decision 3430 (BIA 2000).

An applicant for Withholding of Removal under the Convention Against Torture bears the burden of proving that it is "more likely than not" that he or she would be tortured if removed to the proposed country of removal. See 8 C.F.R. 208.16(c)(2). As with applications for asylum, this burden can be established by testimony without corroboration if the testimony is credible. Id.; see 8 C.F.R. 208.13(a) and 8 CFR 208.16(b). However, an applicant need not provide evidence that such torture is on account of any particular ground. See *Matter of S-V-*, supra. In assessing whether an applicant has satisfied the burden of proof, the Court must consider all evidence relevant to the possibility of future torture, including: evidence of past torture inflicted upon the applicant; evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be

tortured; evidence of gross, flagrant or mass violations of human rights with~in the country of removal; or other relevant information regarding conditions in the country of removal. See 8 C.F.R. 208.16 (c)(3). Yet the existence of gross, flagrant or mass violations of human rights in a particular country does not, as such, constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country. *Matter of S-V-*, supra. Therefore, specific grounds must exist that indicate that the particular applicant would be personally at risk. Id.

As with applications for Asylum and Withholding of Removal under the Act, the Court must make an initial determination of the applicant's credibility in evaluating whether the applicant has met his burden of proof under the Convention Against Torture. See 8 C.F.R. 208.16(c)(2). The Court recognizes the difficulties an alien may face in obtaining corroborating documentary evidence to support his claim, and, as such, the applicant's testimony alone may suffice to establish a claim of prospective torture if it is "believable, consistent and sufficiently detailed to provide a plausible and coherent account of the basis for his fear." See generally *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987). Nevertheless, where corroborating evidence is reasonably available, it should be submitted to the Court. See generally *Matter of Dass*, 20 I&N 120, 124 (BIA 1989).

In the instant case, the Respondent's testimony has generally consisted of his opinion and belief about his treatment if he should return to Jamaica. The Respondent did initially gloss over two arrests, trying to minimize the nature of an armed robbery arrest. The Court did point out to him, though, that the Service would have information about his arrests as the Service generally

checks into criminal records. At that point, the Respondent's memory about his arrests did improve. However, his essential testimony related to his belief that he would be arrested, beaten and tortured if he returns to Jamaica. The testimony was brief and mainly consisted of opinion testimony; the Court will give him the benefit of a finding that his limited testimony credible.

After careful consideration of all of the evidence of record, the Court finds that Respondent has not established that it is more likely than not that he would be tortured if removed to Jamaica. The Respondent has not met his burden of proof as required for protection under the Convention Against Torture. In making this determination, the Court would point out that the Respondent's testimony has consisted of his opinion testimony which has been based on hearsay and rumor.

The Respondent claims that if he returns to Jamaica he will be mistreated and abused by the Jamaican government because the Jamaican government blames deportees for the crime wave in Jamaica. The Respondent said that the Jamaican government is trying to fight the crime wave and blames the increase in crime on criminal deportees who were returned to Jamaica. The Respondent declared that upon arriving in Jamaica he would be abused and harassed by the Jamaican police; he related that the Jamaican government looks down on deportees with criminal convictions. The Respondent accused the Jamaican police of shooting and beating deportees and he stated that he did not want to be shot or killed by the Jamaican police.

The Respondent asserted that he was traveling in Jamaica in the 1 980s when he was stopped at a roadblock by some Jamaican Defense officials. The roadblock was not specifically targeted at the Respondent and everyone

was being stopped and their vehicles searched for guns and drugs.

The Respondent fears physical deportation by the Service to Jamaica because the Service would then inform the Jamaican government of his deportation for criminal convictions. The Court is aware of some Service procedures for deporting criminal aliens; if the Service does not physically accompany an alien on the flight, the Service will confirm that an alien has boarded the flight and it will then tender sealed documentation to airline employees which the airline employees for to the appropriate immigration authorities upon arrival at the port of entry.

The Respondent has conceded that he returned to Jamaica in 1979, 1984, 1985, and 1986 and he admitted that he did not have any problems when he entered in Jamaica in the past. The Respondent also acknowledges that he would have no problems if he returns voluntarily to Jamaica, even if under an order of deportation. The Court is unaware of any requirement that the Respondent be physically deported by the Service. Moreover, the Respondent can appeal adverse decisions all the way to the Supreme Court and, if the Supreme Court also renders a decision adverse to the Respondent, the Respondent can thereafter return to Jamaica on his own without the need for the Service to physically deport him.

If the Respondent thereafter insists on remaining in the United States, it may be necessary for the Service to physically deport him to Jamaica. If the Respondent is returned to Jamaica, said country may indeed inquire into his nationality, his deportation and, further, investigate his criminal history. The Court can find no basis for finding that it would be inappropriate for the Jamaican government to make such inquiries if the Respondent is

deported.[1] No evidence has been presented which establishes that the Jamaican government in policy or practice takes any inappropriate adverse action against criminal deportees upon their arrival in Jamaica.

The Respondent testified from rumor and hearsay that Jamaicans returned to Jamaica as criminal deportees are targeted by the Jamaican police and treated "horribly" by the police. He claims that he will be shot and killed by the police of he is returned as a criminal deportee. The Respondent has no first hand knowledge of any criminal deportee having encountered difficulties after being returned to Jamaica. The Respondent claims that a childhood friend named "Flabo" was the subject of an extortion by the police. However, the Respondent did not keep in touch with him and the Respondent did not provide specifics about the claimed extortion.

Respondent's belief that he would be tortured and perhaps killed if removed to Jamaica is not even supported by the evidence of record which he submitted. While pointing out that there are incident of police brutality, the Amnesty International Report 2000 states that the Jamaican government established a police unit to investigate shootings and other complaints against the police. The Amnesty International Report 2000 also points out that police officers have been dismissed and/or disciplined. See Exhibit 7, Tab "Exhibit A". The Amnesty International Report 1999 and the Amnesty International Report 1998 also evidences that the Jamaican government will take action against its police officers if they overstep

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1. Even United States citizens are subject to inspection upon entering the United States. If the citizen does not establish citizenship to the satisfaction of the inspector, the person is inspected as an alien. See 8 CFR 235.1(b).

their lines of authority. See Exhibit 7, Tab "Exhibit B", Page 214; Exhibit 7, Tab "Exhibit C", Page 214. The United States Country Report On Human Rights Practices For 1998 for Jamaica indicates that action were taken against police officer who shot six persons. See Exhibit 7, Tab "Exhibit H", Page 681. None of the Respondent's background materials support his claim that he will be tortured if he is returned to Jamaica.

The Respondent has conceded that he can return to Jamaica and he concedes that he would have no problems if he returns on his own, even if he does so under an order of deportation. Neither the Respondent's testimony nor the materials submitted by him establish that the Jamaican government, or any of its officials, would specifically target the Respondent even if he was physically deported to Jamaica. The Respondent must make a specific showing that it is more likely than not that he would be tortured if removed to Jamaica. See Matter of S-V-, supra. He has failed to meet his burden of proof.

If an Immigration Judge determines that the alien is more likely than not to be tortured in the country of removal, the application for Withholding of Removal under the Convention Against Torture shall be granted, unless the alien is subject to a ground of "mandatory denial." See 8 C.F.R. §§ 208.16(c)(4), (d)(1) and (d)(2). As with Withholding of Removal under the Act, Withholding of Removal under the Convention Against Torture must be denied if the alien is removable under section 237(a)(4)(D) of the Act (assistance in Nazi persecution or genocide); if the alien participated in the persecution on a basis enumerated in the statute; if the alien has been convicted of a particularly serious crime; if there are serious reasons to believe that the alien committed a serious nonpolitical crime; or if there are

reasonable grounds to believe that the alien is a danger to the security of the United States. See 8 C.F.R. § 208.16(d)(2); see also INA § 241(b)(3)(B). For the purposes of making this determination, an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community. See 8 C.F.R. § 208.16(d)(2). If the evidence indicates the applicability of one or more grounds for denial of Withholding of Removal enumerated in the Act, the applicant shall have the burden of proving by the preponderance of the evidence that such grounds do not apply. See 8 C.F.R. § 208.16(d)(2).

In determining whether a specific crime constitutes a particularly serious crime, the Court must evaluate the nature of the conviction, the sentence imposed and the circumstances and underlying facts of the conviction. See Matter of S-V-, supra.; see also Matter of S-S-, Interim Decision 3374 (BIA 1999). However, an alien who has been convicted of an aggravated felony for which the alien has been sentenced to an aggregate term of imprisonment of at least five years shall be considered to have committed a particularly serious crime. See INA § 241 (b)(3)(B); see also Matter of Aldabesheh, Interim Decision 3410 (BIA 1999). However, the Attorney General has discretionary authority to determine whether an aggravated felony conviction resulting in a sentence of less than five years is a particularly serious crime, using the criteria stated above. See Matter of S-S-, supra; see also Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982).

An alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. See Section 241 (b)(3) of the Act. As the

Respondent was sentenced six years for both of these crimes, he is not eligible to request withholding pursuant to Section 241 (b)(3) of the Act because he has been convicted for a particularly serious crime. The Respondent is also ineligible for withholding of removal because his drug trafficking conviction is a particularly serious crime. See *Matter of U-M-*, 20 I & N Dec. 327 (BIA 1991).

Even if the Respondent had established entitlement to relief, the Respondent is statutorily ineligible for Withholding of Removal under the Convention Against Torture. See 8 CFR 208.1 6(d)(2) and 8 CFR 208.1 6(d)(3).

An alien who has been ordered removed, and is found to be entitled to protection under the Convention Against Torture, but is subject to the provisions of mandatory denial of Withholding of Removal under 8 CFR 208.1 6(d)(2) or (d)(3), shall be granted Deferral of Removal to the country where he is more likely than not to be tortured. See 8 CFR 208.17(a). Deferral of Removal neither confers any lawful or permanent immigration status in the United States upon such alien nor does it necessarily result in the alien's release from the custody of the Service. Moreover, said Deferral is effective only until terminated and is subject to review and termination on two grounds: (1) if the Court determines that it is not likely that the alien would be tortured in the country to which removal has been deferred or (2) if the alien requests that deferral be terminated. See 8 CFR 208.1 7(b)(1). In addition, removal is deferred only to the country to which it has been determined that the alien is likely to be tortured, and therefore, an alien may be removed at any time to another country where he is not likely to be tortured. See 8 CFR 208.1 7(b)(2).

In the instant case, Respondent has not satisfied the

threshold test for Withholding of Removal under the Convention against Torture. The Respondent is ineligible for Deferral of Removal under the Torture Convention.

The Antiterrorism and Effective Death Penalty Act of 1996, hereinafter also referred to "AEDPA", amended the Immigration and Nationality act to eliminate relief under Section 212(c) of the Act. The Respondent argues that he is entitled to request relief under the pre-amendment provisions of Section 212(c) of Act. The Court has examined the Record of Proceedings and the exhibits of record and finds that the Respondent is not eligible for relief pursuant to preamendment Section 212(c) of the Act. The Court held off rendering a decision at the merits hearing to review more carefully the recently published regulations dealing with entitlement to relief under Section 212(c) of the Act. Having examined the new regulations, the Court finds that the Respondent is not eligible for Section 212(c) relief as requested. The Respondent was not in deportation proceedings before the Court which commenced before April 24, 1996; the Respondent was just placed in proceedings by way of an NTA which was issued on December 16, 1999. The Respondent does not fall with in the class of aliens entitled to pursue Section 212(c) relief. See 66 Fed. Reg. 6436-6446, Vol 66 (effective January 22, 2001).

Pursuant to the Act, as the Respondent declined to designate a country of deportation, the Court hereby designates Jamaica as the country of deportation for the Respondent.

In light of the foregoing, the following orders shall issue

ORDERS

WHEREFORE IT IS ORDERED that the Respondent's application for asylum pursuant to Section 208 of the Act be **PRETERMITTED** due to statutory ineligibility.

WHEREFORE IT IS ORDERED that the Respondent's application for withholding of removal pursuant to Section 241 (b)(3) of the Act be **PRETERMITTED** due to statutory ineligiblity.

IT IS HEREBY ORDERED that Respondent's application for Withholding of Removal under the Convention Against Torture, pursuant to 8 C.F.R. § 208.16, is **DENIED.**

IT IS HEREBY FURTHER ORDERED that Respondent's application for Deferral of Removal under the Convention Against Torture, pursuant to 8 C.F.R. § 208.17, is **DENIED.**

IT IS HEREBY FURTHER ORDERED that Respondent's shall be deported from the United States to Jamaica on the charges contained in the Notice To Appear.

Dated this 8th day of February, 2001.

/S_____
TEOFILO CHAPA
United States Immigration Judge

AS THIS DECISION IS BEING MAILED OUT, APPEAL IS RESERVED ON BEHALF OF THE RESPONDENT, THE RESPONDENT'S COUNSEL, AND THE ASSISTANT DISTRICT COUNSEL

APPEAL DUE: March 12, 2001

AN ORDER OF DEPORTATION HAS BEEN ENTERED BY THE COURT. THE RESPONDENT IS HEREBY ADVISED THAT FAILURE TO DEPART OR TO PRESENT ONESELF FOR REMOVAL HAS CIVIL AND CRIMINAL CONSEQUENCES PURSUANT TO THE STATUTES NOTED BELOW.

Section 243 INA - penalties related to removal

(a) Penalty for Failure to Depart.

(1) In general. Any alien against whom a final order of

removal is outstanding by reason of being a member of any of the classes described in section 237(a), who

(A) willfully fails or refuses to depart from the United States within a period of 90 days from the date of the final order of removal under administrative processes, or if judicial review is had, then from the date of the final order of the court,

(B) willfully fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure,

(C) connives or conspires, or takes any other action, designed to prevent or hamper or with the purpose of preventing or hampering the alien' s departure pursuant to such, or

(D) willfully fails or refuses to present himself or herself for removal at the time and place required by the Attorney General pursuant to such order, shall be fined under title 18, United States Code, or imprisoned not more than four years [or 10 years if the alien is a member of any of the classes described in paragraph (1)(E), (2), (3), or (4) of section 237(a)], or both.

Section 274D INA - civil penalties for failure to depart

(a) In general. Any alien subject to a final order of removal who

(1) willfully fails or refuses to

(A) depart from the United States pursuant to the order,

(B) make timely application in good faith for travel or other documents necessary for departure, or

(C) present for removal at the time and place required by the Attorney General; or

(2) conspires to or takes any action designed to prevent or hamper the alien's departure pursuant to the order, shall pay a civil penalty of not more than $500 to the

Commissioner for each day the alien is in violation of this section.

CERTIFICATE OF SERVICE

A copy of this decision and advisals were mailed on this 8TH day of February, 2000 to counsel for the Respondents, to the Assistant District Counsel, and to each of the Respondents with the following forms:

1) Form EOIR-26; 2) Form EOIR-26A; 3) Form EOIR-33; 4)Form EOIR-33/BIA; 6) Legal Agencies List.

/S_____
Clerk, United States Immigration Court

APPENDIX E

U.S. Constitution, Ex Post Facto Clause, Art. 1, § 9, cl. 3:

"**No** Bill of Attainder or **ex post facto Law shall be passed.**" (Emphasis added).

U.S. Constitution, Amendment V, in pertinent part:

"No person shall be * * * deprived of life, liberty, or property, without due process of law* * *."

Antiterrorism and Effective Death Penalty Act of 1996 [Page 110 STAT. 1214] Public Law 104-132 104th Congress

SEC. 440. CRIMINAL ALIEN REMOVAL.

* * *

d) Classes of Excludable Aliens.--Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended-- (1) by striking ``The first sentence of this" and inserting ``This"; and (2) by striking ``has been convicted of one or more aggravated felonies" and all that follows through the end and inserting ``is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i).".

* * *

(e) Aggravated Felony Defined.--Section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(43)), as amended by section 222 of the Immigration and Nationality Technical Corrections Act of 1994 (Public Law 103-416), is

amended--

* * *

(5) in subparagraph (P), by striking ``15 years" and inserting ``5 years", and by striking ``and" at the end;

(f) NOTE: 8 USC 1101 note. Effective Date.--The amendments made by subsection (e) shall apply to convictions entered on or after the date of the 5enactment of this Act, except that the amendment made by subsection (e)(3) shall take effect as if included in the enactment of section 222 of the Immigration and Nationality Technical Corrections Act of 1994.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), in pertinent part:

8 USC Sec. 1101 Definitions
(a) As used in this chapter -

(43) The term "aggravated felony" means -
* * *

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

* * *

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the

previous 15 years.
Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.